(5) (2) (2)

Nos. 00-1751, 00-1777 & 00-1779

Supreme Court, U.S.
FILED
JUN 21 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent
Of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

HANNA PERKINS SCHOOL, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

SENEL TAYLOR, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS DORIS SIMMONS-HARRIS, *ET AL.*

ROBERT H. CHANIN
Counsel of Record
ANDREW D. ROTH
LAURENCE GOLD
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, N.W.
Suite 1000
Washington, D.C. 20005
202-842-2600

(Additional counsel listed on inside cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

39 pp

DAVID G. LATANICK
CLOPPERT, PORTMAN, SAUTER,
LATANICK & FOLEY
225 East Broad Street
Columbus, Ohio 43215
(614) 461-4455

CHRISTOPHER A. LOPEZ
OHIO EDUCATION ASSOCIATION
225 East Broad Street, Box 2550
Columbus, Ohio 43216
(614) 228-4526

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2500

RAYMOND VASVARI
AMERICAN CIVIL LIBERTIES
UNION OF OHIO
FOUNDATION, INC.
4506 Chester Avenue
Cleveland, Ohio 44103
(216) 472-2200

ELLIOT M. MINCBERG
JUDITH E. SCHAEFFER
PEOPLF FOR THE AMERICAN
WAY FOUNDATION
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 467-4999

STEVEN K. GREEN
AMERICANS UNITED FOR
SEPARATION OF CHURCH
AND STATE
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234

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Three petitions for *certiorari* have been filed seeking review of the Sixth Circuit's judgment and decision in *Simmons-Harris* v. *Zelman*, 234 F.3d 945 (6th Cir. 2000)—one by the State of Ohio defendants in this litigation ("State Pet.") (No. 00-1751); a second by Hanna Perkins School, *et al.*, a group of intervenors-defendants ("HP Pet.") (No. 00-1777); and a third by Senel Taylor, *et al.*, another group of intervenors-defendants ("ST Pet.") (No. 00-1779). This brief in opposition by plaintiffs Doris Simmons-Harris, *et al.*, responds to all three *certiorari* petitions.[1]

STATEMENT OF THE CASE

A. Statement of Facts

The Ohio Pilot Project Scholarship Program ("Ohio Voucher Program" or "Program") is a tuition voucher program, which, in basic outline, is structured as follows. The Program provides tuition vouchers "according to family income" to the parents of "children residing within the [Cleveland City School District] in grades kindergarten through eighth grade," to be used towards the payment of tuition at any private school within the District that (1) has registered to participate in the Program, and (2) has admitted the child to the school in accordance with a set of non-discriminatory "priority rules" established by the Program. State Pet. App. 4a-5a.[2] *See generally* State Pet. at 3-6. Beyond these basics, five factual points elided or obscured in the *certiorari* petitions bear emphasis:

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[1] Sue Gatton, *et al.*, another group of plaintiffs, are filing a separate brief in opposition also responding to all three *certiorari* petitions.

[2] Family income factors into the equation in the following manner: "The program requires participating private schools to cap tuition at $2500 per [voucher] student per year and pays 90% of whatever tuition the school actually charges for low-income families; for other families, the State pays 75% of the school's tuition up to a maximum of $1875." State Pet. App. 4a.

1. The Ohio Voucher Program "permits"—but does not require—the participation of certain out-of-district public schools. State Pet. at 6. In fact, "[n]o public schools have registered [to participate in] the [P]rogram since its enactment." State Pet. App. 5a.

2. Of the 56 private schools that did register to participate in the Program during the 1999-2000 school year, 46—or 82%—were sectarian. *Id.*

3. "[C]lose to 96% of the students enrolled in the [P]rogram for the 1999-2000 school year attended sectarian institutions." *Id.* 26a. That is because "many of the sectarian schools are larger and provide a greater number of places for children in the [V]oucher [P]rogram." *Id.*

4. The educational programs of the participating sectarian private schools are almost without exception designed to promote the school's particular theology:

> The [participating] schools vary in their religious affiliation and approaches; however, the handbooks and mission statements of these schools reflect that most believe in interweaving religious beliefs with secular subjects. The sectarian schools also follow religious guidelines, including instruction in religion and mandated participation in religious services. [*Id.* 6a.]

See also id. 64a ("[I]t can generally be said that a central part of each [participating sectarian] school's program is instruction in the theology or doctrine of a particular faith and that religion and religious doctrines are an integral part of the entire school experience.").

5. The public funds that flow to participating private schools under the Ohio Voucher Program are entirely unrestricted, and may be used by those schools for whatever purposes the schools deem necessary and appropriate—which in the case of sectarian private schools would include the payment of salaries and

> expenses of school administrators, teachers and other personnel (including members of religious orders) affiliated with the school's religious mission, the purchase of literature and other materials identified with the school's religious mission, the maintenance and construction of facilities used for religious purposes, and other expenditures that support or maintain religious education, worship, and indoctrination, and other religious activities.

B. Proceedings Below

On cross-motions for summary judgment, the District Court held that the Ohio Voucher Program violated the Establishment Clause of the First Amendment to the United States Constitution, finding that "[i]n all pertinent respects, the Voucher Program is factually indistinguishable from the tuition reimbursement program struck down [on Establishment Clause grounds] in *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S.Ct. 2955 (1973)." State Pet. App. 123a. In so holding, the District Court rejected petitioners' reliance on a line of this Court's post-*Nyquist* Establishment Clause decisions—concluding that "[t]his case is unlike any case" in that line. *Id.* 125a; *see also id.* 94a-117a.

The Sixth Circuit affirmed the District Court's Establishment Clause ruling, over the dissent of Judge Ryan. The panel majority agreed with the district court that *Nyquist* "is on point with the matter at hand," *id.* 13a, and that the post-*Nyquist* Establishment Clause decisions put forward by petitioners are not, *id.* 27a-29a; *see also id.* 17a-23a.[3] Accordingly, the panel majority held that *Nyquist* "governs our result." *Id.* 24a. In dissenting, Judge Ryan took the

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[3] The Sixth Circuit's analysis of the post-*Nyquist* decisions encompassed *Mitchell v. Helms*, 530 U.S. 793 (2000), which was decided while this case was on appeal.

position that *Nyquist* is not on point, and thus does not dictate the result here. *Id.* 34a-36a; *see also id.* 56a-58a.

The Sixth Circuit denied *en banc* review.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE QUESTION PRESENTED BY ALL THREE PETITIONER GROUPS

In *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), this Court ruled on whether one particular type of school-aid program—a private school tuition payment program—passes muster under the *Lemon v. Kurtzman*, 403 U.S. 602 (1971) Establishment Clause test. Since *Nyquist*, the Court has been called on in a series of cases to determine whether a succession of *other* types of school-aid programs comply with the Establishment Clause. In those decisions, the Court has recognized that the particular school-aid program at issue was qualitatively different from the *Nyquist* private school tuition payment program, and has proceeded in a manner that maintains *Nyquist* as the governing precedent in its stated area of application.

After correctly concluding that the Ohio Voucher Program is a *Nyquist*-type program, and explaining why none of this Court's post-*Nyquist* cases is on point, the Sixth Circuit applied the *Nyquist* holding. Accordingly, the decision below—which scrupulously and faithfully follows this Court's teachings—does not on its own terms warrant review. *Infra* pp. 5-21.

Nor is there a conflict of any substance between the decision below and the decision of the Wisconsin Supreme Court in *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 525 U.S. 997 (1998). The *Jackson* court did not take issue with *Nyquist per se* or question the continued vitality of

Nyquist in its stated area of application. Rather, the *Jackson* court concluded that the Wisconsin tuition voucher program there at issue was factually distinguishable from the New York program struck down in *Nyquist*, and more akin to the types of school-aid programs sustained in this Court's post-*Nyquist* Establishment Clause cases. The distinctions between the Wisconsin and New York programs posited by the *Jackson* court are, to be sure, attenuated, but the *Jackson* court's grounding of its decision on those distinctions does not bespeak a disagreement on a question of Establishment Clause jurisprudence worthy of this Court's attention. *Infra* pp. 21-23.

The *certiorari* petitions therefore should be denied.

A. 1. *Nyquist* involved an Establishment Clause challenge to three separate school-aid programs adopted by New York in 1972, including a private elementary and secondary school tuition reimbursement program (hereinafter "New York program"). The *Nyquist* Court summed up the essence of the New York program as follows: "The state program is designed to allow direct, unrestricted grants of $50 to $100 per child (but no more than 50% of tuition actually paid) as reimbursement to parents in low-income brackets who send their children to nonpublic schools, the bulk of which [approximately 85%] is concededly sectarian in orientation." 413 U.S. at 780. *See also id.* at 768.

In considering whether the New York program ran afoul of the Establishment Clause, the *Nyquist* Court applied the three-prong test of *Lemon v. Kurtzman*, *supra*. *See* 413 U.S. at 772-73. Referring to "a series of legislative findings designed to explain the impetus for" the New York program, *id.* at 764, the Court had no difficulty in concluding that the program was adequately supported by legitimate secular purposes, and thus satisfied the first prong of the *Lemon* test. *Id.* at 773; *see also id.* at 788-89, 795. The Court emphasized, however, that "the propriety of a legislature's

purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State." *Id.* at 774.

The Court then turned to the "primary effect" *Lemon* prong, and concluded that the New York program fell short. *Id.* at 780-89. The Court began by noting that its prior Establishment Clause cases condemned all forms of direct governmental financial aid in support of religious activities or institutions "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes." *Id.* at 780. Accordingly, the Court stated that "[t]he controlling question" was "whether the fact that the [tuition] grants are delivered to parents rather than the schools is of such significance as to compel a contrary result." *Id.* at 781. The Court concluded that it was not.

The Court recognized that it twice before had "upheld laws that provided benefits to children attending religious schools and to their parents: . . . in *Everson* [*v. Board of Education*, 330 U.S. 1 (1947),] parents were reimbursed for bus fares paid to send their children to parochial schools, and in [*Board of Education v.*] *Allen*[, 392 U.S. 236 (1968),] textbooks were loaned directly to the children." 413 U.S. at 781. But the Court found that *Everson* and *Allen* were distinguishable in two important respects.

First, because the state aid in the two earlier cases had been earmarked for purely secular services or supplies and could not be used for any other purpose, the aid did not have the impermissible effect of advancing religion. *Id.* at 781-82. Conversely,

> [t]he tuition grants here are subject to no such restrictions. There has been no endeavor "to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. [*Id.* at 783 (internal citation omitted).]

Second, in both *Everson* and *Allen* "the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools," whereas the same could not be said of the New York program's beneficiaries. *Id.* at 782 n.38 (emphasis in original). In this regard, the Court added the following caveat:

> Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the [New York program's] beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. [*Id.* at 782-83 n.38.]

The Court cited the "G.I. Bill" as a possible example of such a scholarship program, and in so doing provided a "See also" citation to footnote 32 of its opinion, *id.*, in which it had alluded to the "significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." *Id.* at 777 n.32 (internal quotations and citations omitted).[4]

2. The Ohio Voucher Program pays substantially more money and defrays a substantially greater percentage of a participating private school's tuition than the New York program, and it offers that payment up-front rather than as a reimbursement. *Supra* p. 1 & n.2. But aside from these

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[4] Having concluded that the New York program had the impermissible primary effect of advancing religion, the *Nyquist* Court saw no need to decide whether the program also created an excessive entanglement between church and state. 413 U.S. at 794.

differences—neither of which possibly can be said to favor the Ohio Voucher Program's constitutionality—the two programs are identical for Establishment Clause purposes. As the Sixth Circuit put it:

> Factually, the [P]rogram at hand is a tuition grant program for low-income parents whose children attend private school parallel to the tuition reimbursement program found impermissible in *Nyquist*. Under both the New York statute in *Nyquist*, as well as the Ohio Statute at issue, parents receive government funds, either in direct payment for private school tuition or as a reimbursement for the same, and in both cases, the great majority of schools benefited by these tuition dollars are sectarian. . . . In both *Nyquist* and this case, there are no restrictions on the religious schools as to their use of the tuition funds—the funds may be used for religious instruction or materials as easily as for erasers and playground equipment. [State Pet. App. 24a-25a.][5]

In short, because the Ohio Voucher Program has the essential features that led the *Nyquist* Court to invalidate the New York program on Establishment Clause grounds, the courts below correctly concluded that the two programs are constitutionally indistinguishable.[6]

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[5] *See also* State Pet. App. 92a ("Taken together, the fact that the [Ohio] Voucher Program overwhelmingly benefits sectarian schools and that the grants provided under the Program are not restricted to supporting only secular functions of a participating school's educational program make it indistinguishable for Establishment Clause purposes from the tuition reimbursement program in *Nyquist*.").

[6] Indeed, the effect of certain other differences between this case and *Nyquist* is to make even clearer the Establishment Clause violation.

First, the Court decided *Nyquist* without a factual record concerning the "characteristics of individual schools" that qualified to participate in the New York program, resting its decision on the generalization that the bulk of those schools were "church affiliated," 413 U.S. at 768, or "sectarian in orientation," *id.* at 780. Here, there is abundant evidence in the summary judgment record—in the form of handbooks and mission

B. To be sure, petitioners continue to take the position that *Nyquist* is *not* on point, but none of their arguments in support of that position can withstand scrutiny.

1. Petitioners' principal argument is that the Ohio Voucher Program is a program under which school aid is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited"—*viz.*, a program of the type the *Nyquist* Court did not reach and that this Court has since upheld in a series of decisions beginning with *Mueller v. Allen*, 463 U.S. 388 (1983) and going through *Mitchell v. Helms*, 530 U.S. 793 (2000). *See* State Pet. at 18-25; ST Pet. at 10-11, 16-21; HP Pet. at 17-23, 29. Petitioners are wrong.

(a) Petitioners do not explain the basis for characterizing the Ohio Voucher Program as a program under which school aid is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of

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statements that the participating sectarian schools have prepared and disseminated to parents interested in sending a child to those schools—that the participating sectarian private schools, virtually without exception, integrate religious indoctrination and instruction into their educational programs. *Supra* p. 2.

Second, the New York program was permanently enjoined shortly after its enactment, *see* 350 F. Supp. 655, 673 (lower court opinion), precluding development of a factual record concerning the extent to which the tuition reimbursements provided thereunder were sufficient to enable lower-income parents to send their children to sectarian private schools. The Ohio Voucher Program has been in operation for five school years, and that experience conclusively demonstrates that the vouchers have had their intended effect of enabling thousands of children from lower-income families to attend sectarian private schools, thus swelling the ranks of those schools. This Court has recognized that "an affirmative if not dominant policy of church schools" is "to assure future adherents to a particular faith by having control of their total education at an early age." *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970). Unlike *Nyquist*, there is evidence here to confirm that the Ohio Voucher Program advances this policy.

the institution benefited." But the intimation is that such a characterization is appropriate because—unlike the New York program—the Ohio Voucher Program holds out the theoretical possibility that parents receiving a voucher on their child's behalf can use that voucher to send their child to *an out-of-district public school*.

The obvious flaw in this argument is that out-of-district public schools are not required to participate in the Ohio Voucher Program, and not a single such school ever has registered to do so. *Supra* p. 2. Accordingly, parents receiving a tuition voucher on their child's behalf under the Program cannot *in fact* use that voucher to send their child to an out-of-district public school.

From that perspective—which is the only perspective that possibly can matter in assessing the real-world "effect" of a school-aid program under the second prong of the *Lemon* test—the Ohio Voucher Program is no more a *Nyquist*-footnote-38-type program than the New York program itself. As the Sixth Circuit aptly put it, the Ohio Voucher Program "has the same effect" as the New York program "of benefiting only students in particular private, and mostly religious, schools, irrespective of the illusory choice provided on the face of the Ohio statute." State Pet. App. 32a.

Indeed, the State petitioners concede as much in setting forth their Question Presented. After correctly describing the Ohio Voucher Program as one in which "[p]arents of children in kindergarten through eighth grade may use the scholarships to pay tuition for th[eir] children *at the private schools of their choosing*, including religious schools," the State petitioners frame the Question Presented as "Whether the Establishment Clause prohibits Ohio's [P]rogram from authorizing parents to use the scholarships *at any private school*, whether religious or not." State Pet. at i (emphasis added). Given that the overwhelming majority of the private school choices available to Cleveland parents receiving

vouchers under the Ohio Voucher Program are *sectarian* private schools—*i.e.*, 82% of the participating private schools, and a considerably higher percentage of the available private school "slots"—that is precisely the question presented—and answered in the affirmative—in *Nyquist* with respect to the New York program.[7]

(b) The salient point of distinction between *Nyquist* and this case on the one hand and the post-*Nyquist* cases relied on by petitioners on the other is this: in contrast to *Nyquist*, each of the post-*Nyquist* cases involved a type of school-aid program that "made [the aid] available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited"—*viz.*, a type of school-aid program the *Nyquist* Court recognized to be qualitatively different in Establishment Clause terms from the New York program that was before it—and each of the cases treats with the constitutionality of the program at issue in a manner that preserves *Nyquist* as the governing precedent in its stated area of application.

• In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court rejected an Establishment Clause challenge to a Minnesota program that allowed parents to deduct from their state income taxes a wide range of educational expenses incurred

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[7] Petitioners' intimation that the Ohio Voucher Program can properly be characterized as a *Nyquist*-footnote-38-type program because it is part of a single legislative enactment providing "as many tutorial assistance grants to [Cleveland] public school students as it does scholarships to private school students," *e.g.*, State Pet. at 24, is equally without merit. The tutorial assistance program is a free-standing program that provides additional state dollars in aid of *public* schooling in Cleveland. *See* State Pet. App. 180a. It thus is of no greater relevance in assessing the Establishment Clause "effect" of a *private school* voucher program than any other legislative appropriation in favor of the Cleveland City School District. *See also infra* p. 19.

"for the 'tuition, textbooks and transportation' of dependents attending elementary or secondary schools." 463 U.S. at 391 & n.2.

The Court found that the Minnesota program was "*vitally different* from the [New York program] struck down in *Nyquist*," because tax deductions were available under the Minnesota program "for educational expenses incurred by *all* parents, including those whose children attend public schools," whereas in *Nyquist* "public assistance amounting to tuition grants was provided only to parents of children in *nonpublic* schools." *Id.* at 397-98 (first emphasis added; second and third emphases in original). That point of distinction, the Court continued,

> had considerable bearing on our decision [in *Nyquist*] striking down the New York statute at issue; we explicitly distinguished both *Allen* and *Everson* on the grounds that "[i]n both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools." 413 U.S., at 782-783, n. 38 (emphasis in original). Moreover, we intimated that "public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited," *ibid.*, might not offend the Establishment Clause. We think the tax deduction adopted by Minnesota is more similar to this latter type of program than it is to the arrangement struck down in *Nyquist*. [463 U.S. at 398 (footnote omitted).]

• In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court held that the Establishment Clause does not prohibit the State of Washington from providing tuition assistance under a State vocational rehabilitation program to a blind person studying at a Christian college to become a pastor, missionary, or youth director.

Contrasting the situation at hand to that in *Nyquist*, the Court found that the Washington program was "'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,'" was "in no way skewed towards religion," and "create[d] no financial incentive for students to undertake sectarian education." *Id.* at 487-88 (citing *Nyquist*, 782-83 n.38 & 785-86). It followed, said the *Witters* Court, that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 487. The Court elaborated as follows:

> [The Washington program] does not tend to provide greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. *In this case*, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State. [*Id.* at 488 (emphasis added) (citations omitted).][8]

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[8] Justice Powell, joined by Chief Justice Burger and Justice Rehnquist (as he then was), filed a concurring opinion "to emphasize that *Mueller* strongly supports the result we reach today." 474 U.S. at 490. Justice O'Connor joined only Parts I and III of the Court's opinion and concurred in the judgment—finding Justice Powell's invocation of *Mueller* persuasive, and agreeing with the Court that "[t]he aid to religion at issue here is the result of petitioner's private choice." *Id.* at 493. Justice White, who had dissented in *Nyquist*, also filed a concurring opinion stating that he "agree[d] with most of Justice Powell's concurring opinion with respect to the relevance of *Mueller*." *Id.* at 490.

• In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), the Court held that the Establishment Clause does not prohibit a school district from providing a sign-language interpreter to accompany a deaf student to a Roman Catholic high school, pursuant to the Individuals with Disabilities Act ("IDEA"). The Court held that this result followed ineluctably from *Mueller* and *Witters*, inasmuch as

> [t]he service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as "disabled" under the IDEA, without regard to the "sectarian-nonsectarian, or public-nonpublic nature" of the school the child attends. By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking. [*Id.* at 10.][9]

• In *Agostini v. Felton*, 521 U.S. 203 (1997), the Court overruled *Aguilar v. Felton*, 473 U.S. 402 (1985), holding that the Establishment Clause does not prohibit New York City from sending public school teachers into sectarian private schools to provide remedial education to disadvantaged students, pursuant to Title I of the Elementary and Secondary Act of 1965 ("Title I"). In overruling *Aguilar*, the Court emphasized the point, not implicated here, that *Zobrest* had "abandoned the presumption . . . that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." 521 U.S. at 223. *See also supra* p. 14 n. 9.

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[9] In a portion of its opinion not relevant here, the Court held that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." 509 U.S. at 13.

The *Agostini* Court also emphasized that Title I was a program of general applicability under which remedial assistance was provided "to *all* eligible children," without regard to whether they attended a public or private school. 521 U.S. at 209-10 (emphasis in original). For this reason, the Title I program was indistinguishable from the programs in *Witters* and *Zobrest* in two critical respects. First, the Title I program did not "have the effect of advancing religion through [state-sponsored] indoctrination," *id.* at 226, because any Title I aid provided to students attending sectarian schools reached those schools "'only as a result of the genuinely independent and private choices of' individuals." *Id.* (quoting *Witters*, 474 U.S. at 487, and noting that "[t]he same logic applied in *Zobrest*").[10] Second, the Title I program did not "have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." 521 U.S. at 231.

• Finally, *Mitchell v. Helms*, 530 U.S. 793 (2000) holds—albeit through two separate opinions—that the Establishment Clause does not prohibit a Louisiana school district from lending educational materials and equipment to sectarian private schools, pursuant to Chapter 2 of the Education Consolidation and Improvement Act of 1981 ("Chapter 2").

Justice Thomas' opinion for four members of the Court found it decisive that the Chapter 2 program "makes a broad array of schools eligible for aid without regard to their religious affiliations or lack thereof," 530 U.S. at 830—including "both public and private schools," *id.* at 802—analogizing the case in this respect to, *inter alia*, *Witters* and *Zobrest*, *id.* at 809-14.

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[10] In this first respect, the Court also found it significant that it had not been shown that Title I instructors had "attempted to inculcate religion in students," that Title I services were "by law supplemental to the regular curricula" of the benefited schools, and that "[n]o Title I funds ever reach the coffers of religious schools." 521 U.S. at 226-28.

Justice O'Connor, joined by Justice Breyer, concurred on the narrower ground that the Chapter 2 program "bears the same hallmarks of the New York City Title I program that we found important in *Agostini*," 530 U.S. at 848—including, but not limited to, the hallmark that "[t]he aid is available to assist students regardless of whether they attend public or private non-profit religious schools," *id.*

At the same time, Justice O'Connor disassociated herself from the plurality opinion's invocation of *Witters* and *Zobrest* as analogous cases, inasmuch as "we decided *Witters* and *Zobrest* on the understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use," whereas the aid provided under the Chapter 2 program was distributed on a per-capita basis directly to the schools. *Id.* at 841.[11] In so doing, Justice O'Connor made it clear that where school aid does flow indirectly to sectarian schools through the private choice of aid recipients, that aid is consistent with the Establishment Clause *only* where the private choice of a sectarian school is a "'genuinely independent'" or "true" one, as those terms were given content in *Witters* and *Zobrest*. *Id.* at 841-43 (quoting *Witters*, 474 U.S. at 487).[12]

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[11] Justice O'Connor also disassociated herself from the plurality opinion's "near-absolute" position that "neutrality" standing alone is sufficient to sustain a school-aid program under the Establishment Clause. 530 U.S. at 838-40.

[12] Although *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), does not fall within this Court's post-*Nyquist* line of "school-aid" cases, the State petitioners and the Senel Taylor, *et al.* petitioners rely on *Rosenberger* as well. *See* State Pet. at 18; ST Pet. at 20-21. It is appropriate to point out, therefore, that *Rosenberger* is entirely consistent with that line of cases. As in *Mueller*, *Witters* and *Zobrest*, the fact that the government program at issue in *Rosenberger* was a generally-applicable one with a "broad," "diverse," "wide spectrum" of beneficiaries figured prominently in the Court's Establishment Clause analysis. *See* 515 U.S. at 839, 842 (analogizing the case in this respect to,

The reason why the Ohio Voucher Program is unlike the school-aid programs involved in these post-*Nyquist* Establishment Clause cases—and cannot properly be considered a program under which school aid is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited"—was succinctly summarized by the District Court as follows:

> Because the vast majority of schools participating in the Voucher Program are sectarian in nature, the Program does not make aid available without regard to the nature of the institutions benefited. Likewise, recipients do not have available to them the kind of "choice" contemplated by post-*Nyquist* cases. By the very nature of the Program, parents do not have a genuine choice between sending their children to sectarian or nonsectarian schools because sectarian schools overwhelmingly predominate. Unlike cases decided after *Nyquist*, the aid provided under the Voucher Program directly benefits the religious functions of participating sectarian institutions because it cannot be said that aid only flows to religious institutions as a result of the independent and private choices of recipients. Thus, the Program has the effect of advancing religion through government-supported religious indoctrination.
>
> The Voucher Program is also unlike post-*Nyquist* cases in that program criteria create incentives for students to attend religious schools. Voucher students may only redeem their vouchers at schools which have registered and are authorized to participate in the Program, not at any school of their choice. Because the

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e.g., *Mueller* and *Witters*); *see also id.* at 847-48 (O'Connor, J., concurring) (noting that the University had "established a generally applicable program to encourage the free exchange of ideas by its students, an expressive marketplace that includes some 15 student publications with predictably divergent viewpoints," and analogizing the case in that respect to *Witters* and *Zobrest*).

> vast majority of participating schools are sectarian in nature, the Program directly influences whether a recipient chooses to attend a religious institution. [State Pet. App. 125a.]

And as the Court of Appeals added:

> We find that when, as here, the government has established a program which does not permit private citizens to direct government aid freely as is their private choice, but which restricts their choice to a panoply of religious institutions and spaces with only a few alternative possibilities, then the Establishment Clause is violated. . . . There is no neutral aid when that aid principally flows to religious institutions; nor is there truly "private choice" when the available choices resulting from the program design are predominantly religious. [*Id.* 29a.]

In sum, all of the post-*Nyquist* school-aid cases dealt with school-aid programs that were different in the most basic Establishment Clause terms from the New York program struck down in *Nyquist*. These programs were "available generally," were "in no way skewed towards religion," and "creat[ed] no financial incentive to undertake sectarian education." The *Mueller-Mitchell* line of cases is thus consistent with *Nyquist* not just in the formal sense that these cases distinguish *Nyquist*, but in the more fundamental sense that the different results follow from the consistent application of the *Lemon v. Kurtzman* Establishment Clause analysis to the particular type of school-aid program in question.

2. Petitioners seek to buttress their principal argument—that the Ohio Voucher Program is not a school-aid program governed by *Nyquist*, but rather a program saved out of *Nyquist* in its footnote 38—by proffering four "distinctions" between the New York program and the Ohio Voucher Program. None of these distinctions has any substance.

(a) Petitioners make much of the fact that Cleveland parents can send their children to a public school—including a public charter or magnet school if their children are accepted in such a school—in lieu of sending them to a private school at public expense under the Ohio Voucher Program. *See* State Pet. at 16-17, 22; ST Pet. at 20-21; HP Pet. at 25. But that does not make this case different from *Nyquist*, inasmuch as parents eligible for private school tuition assistance under the New York program also could choose to send their children to public schools.

The *Nyquist* Court expressly noted that "[t]he grants to parents of private school children are given in addition to the right that they have to send their children to public schools 'totally at state expense.'" 413 U.S. at 782 n.38. That being so, the private school tuition grants under the New York program had to be considered on their own terms for Establishment Clause purposes; to do otherwise, the Court stated, would "provide a basis for approving through tuition grants the *complete subsidization* of all religious schools," a result "wholly at variance with the Establishment Clause." *Id.* (emphasis in original). *See also* State Pet. App. 23a-24a & 117a-122a.

(b) The State petitioners assert that "there can be no realistic contention that Ohio is fostering subtle social coercion of parents to withdraw from public schools and enroll their children in private, sectarian schools." State Pet. at 21. We disagree—but we do so as an aside inasmuch as the State's assertion affords no basis for distinguishing this case from *Nyquist*.[13] The defendants in *Nyquist* made a

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[13] Although there are arguments on both sides, it certainly is "realistic" to view Ohio's decision to spend on a private school voucher program more than $10 million per year that otherwise could be spent on improving the Cleveland public schools as pushing Cleveland parents in precisely that direction. The counter-argument is that a private school voucher program will itself bring about improvement in the public schools

similar assertion, and the Court responded that coercion is "not a necessary element of any claim under the Establishment Clause." 413 U.S. at 786.

(c) The Hanna Perkins, *et al.* petitioners take up—albeit rather obliquely, *see* HP Pet. at 17; *see also* State Pet. at 9-10—Judge Ryan's argument in dissent that *Nyquist* is distinguishable on the ground that the purpose of the New York program was to help "financially troubled *private* schools," whereas the purpose of the Ohio Voucher Program is to help "poverty-level students attending the *public schools* in Cleveland." State Pet. App. 37a (emphasis in original). That argument is doubly wrong.

First, the legislative findings supporting the New York program—*e.g.*, the need to promote a "competitive and diverse alternative to public education," and to enhance the educational opportunities available "to children of lower-income families," *Nyquist*, 413 U.S. at 764-65[14]—parallel the stated purposes of the Ohio Voucher Program.

Second, differences in the complex of purposes that actuated first New York and now Ohio—if any there be—cannot distinguish this case from *Nyquist*. The *Nyquist* Court's Establishment Clause holding did not turn on the particular social purposes of the New York program, but rather on the program's *effect*. *Supra* pp. 5-6.

(d) Finally, the Hanna Perkins, *et al.* petitioners seek to distinguish *Nyquist* on the ground—also embraced in Judge

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through increased "competition" from state-subsidized private schools. But to hear Cleveland parents (as represented by the Senel Taylor, *et al.* petitioners) tell it, the Ohio Voucher Program has done little if anything to bring about such improvement in the Cleveland public schools. *See* ST Pet. at 9 (outlining the "shocking" details of "a school system that, despite the State's intervention, continues to exhibit severe dysfunction").

[14] The Hanna Perkins petitioners cite not these legislative findings, but rather the findings in support of the maintenance-and-repair direct-grant program separately considered by the *Nyquist* Court.

Ryan's dissent—that the New York program did not prohibit qualifying private schools from engaging in religious discrimination in admissions, whereas the Ohio Voucher Program does. *See* HP Pet. at 28-29; *see also* State Pet. App. 38a. To be sure, the *Nyquist* Court mentioned in setting out the background of the case that qualifying private schools "could be ones" that, *inter alia*, "impose religious restrictions on admissions." 413 U.S. at 767. But the Court did not mention this fact in explicating the grounds for its decision, *see id.* at 780-89—much less hold that the New York program's constitutional infirmity lay in its failure to proscribe this or any other form of religious discrimination by qualifying private schools.[15] As Chief Judge Posner has observed, in an insight that fits aptly here, "[i]t is not cricket to distinguish a precedent by pointing to a fact mentioned by the court in the previous opinion but clearly given no weight by it. Otherwise no precedents would have any force, for no two cases are exactly alike." *Khan v. State Oil Co.*, 93 F.3d 1358, 1362 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 3 (1997).

C. Straining to find an alternative basis for a *certiorari* grant, the State petitioners argue that the decision below is in conflict with the decision of the Wisconsin Supreme Court in *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 525 U.S. 997 (1998)—which rejected an Establishment Clause challenge to a Milwaukee, Wisconsin private school tuition voucher program. State Pet. at 12-17. There is no conflict of substance between the two decisions.

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[15] Nor do the Hanna Perkins, *et al.* petitioners explain why it is relevant for Establishment Clause purposes whether a government program that pays for children to attend predominately sectarian private schools allows or prohibits religious discrimination in admissions. In either event, public money is being used to indoctrinate the children who attend a sectarian private school in that school's particular theology.

The *Jackson* court did not disagree with the conclusion of the court below that school-aid programs of the type struck down as inconsistent with the Establishment Clause in *Nyquist* are unconstitutional. Rather, the *Jackson* court concluded that "there are significant distinctions" between the Milwaukee voucher program and the New York program at issue in *Nyquist*, and these distinctions, in that court's opinion, were sufficient to save the constitutionality of the Milwaukee program.[16]

The *Jackson* plaintiffs responded by filing a petition for *certiorari* with this Court, arguing that for Establishment Clause purposes the Milwaukee voucher program could not be distinguished from the New York program on the fact-specific grounds relied on by the *Jackson* court, and that *Jackson* therefore was in conflict with *Nyquist*. But their petition was denied.

Candor compels us to acknowledge that, in our view, the *Jackson* petitioners were right in questioning the *Jackson* court's distinctions of *Nyquist*, the denial of their petition

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[16] The *Jackson* court stated:

> We reject the Respondents' argument that this case is controlled by [*Nyquist*]. Although the tuition reimbursement program in *Nyquist* closely parallels the amended [Milwaukee program], there are significant distinctions. In *Nyquist*, each of the facets of the challenged program directed aid exclusively to private schools and their students. The [Milwaukee program,] by contrast, provides a neutral benefit to qualifying parents of school-age children in Milwaukee Public Schools. Unlike the program in *Nyquist*, the only financially-qualified Milwaukee students excluded from participation in the amended [Milwaukee program] are those in the fourth grade or higher who are already attending private schools. The amended [Milwaukee program], viewed in its surrounding context, merely adds religious schools to a range of pre-existing educational choices available to [Milwaukee public school] children. This seminal fact takes the amended [Milwaukee program] out of the *Nyquist* construct and places it within the framework of neutral education assistance programs. [578 N.W.2d at 614 n.9.]

notwithstanding. Be that as it may, the decisions below—which faithfully apply *Nyquist* and do not essay any of the attenuated *Jackson* distinctions—give every reason to believe that *Jackson* will prove to be an aberration.[17]

II. THE COLLATERAL ESTOPPEL QUESTION PRESENTED BY ONLY THE SENEL TAYLOR, *ET AL.* PETITIONERS

The Sixth Circuit panel below unanimously affirmed the district court's ruling that the Establishment Clause *dicta* in *Goff*, *supra* p. 23 n. 17, did not collaterally estop plaintiffs' Establishment Clause claim in this case. That ruling, which rests on well-settled principles, is "eminently correct"—as Judge Ryan, who otherwise was in dissent, recognized. State Pet. App. 34a. As the Sixth Circuit concluded:

> In *Goff*, the Ohio Supreme Court held that the 1995 school voucher program was enacted in violation of the one-subject rule of the Ohio Constitution, and on that

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[17] The Senel Taylor, *et al.* petitioners—but not the State petitioners — argue that the decision below also is in conflict with *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999) ("*Goff*"); *Campbell v. Manchester Board of School Directors*, 641 A.2d 352 (Vt. 1994); and *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999). ST Pet. at 11-13. The Hanna Perkins, *et al.* petitioners second that conflict argument with respect to *Goff* and *Campbell*, but not *Kotterman*. HP Pet. at 15-16. These conflict claims are even weaker than the State petitioners' claim invoking *Jackson*.

The *Goff* court's conclusion that the predecessor Ohio voucher program was consistent with the Establishment Clause was *dicta*, inasmuch as the court struck down that predecessor program on state law grounds. The *Campbell* court found *Mueller* and *Witters* controlling, rather than *Nyquist*, because the challenged voucher program was a generally-applicable *Nyquist*-footnote-38-type program open to both private and public schools. *Kotterman* involved a tax credit program, which—contrary to the claim of the Senel Taylor, *et al.* petitioners—was, under *Mueller*, subject to an Establishment Clause analysis quite different than that applicable to a tuition voucher program.

> basis, ordered the program in its entirety "stricken" from the Ohio statute books. 711 N.E.2d at 203. That ruling entitled the plaintiffs to the relief they requested, and therefore, any discussion of other grounds for striking or upholding the statute could be neither necessary nor essential to the holding. . . . Because Plaintiffs would not be able to obtain Supreme Court review of the Ohio Supreme Court's determination as to the Establishment Clause, such determinations cannot constitute collateral estoppel. [State Pet. App. 30a-31a.]

The Senel Taylor, *et al.* petitioners are unable to cite any case or to make any argument that puts the Sixth Circuit's conclusion into the least question.

CONCLUSION

For the reasons stated, the petitions for *certiorari* should be denied.

Respectfully submitted,

ROBERT H. CHANIN
Counsel of Record
ANDREW D. ROTH
LAURENCE GOLD
BREDHOFF & KAISER, P.L.L.C.
805 15th Street, N.W.
Suite 1000
Washington, D.C. 20005
202-842-2600

DAVID G. LATANICK
CLOPPERT, PORTMAN, SAUTER, LATANICK & FOLEY
225 East Broad Street
Columbus, Ohio 43215
(614) 461-4455

CHRISTOPHER A. LOPEZ
OHIO EDUCATION ASSOCIATION
225 East Broad Street, Box 2550
Columbus, Ohio 43216
(614) 228-4526

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2500

RAYMOND VASVARI
AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC.
4506 Chester Avenue
Cleveland, Ohio 44103
(216) 472-2200

ELLIOT M. MINCBERG
JUDITH E. SCHAEFFER
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 467-4999

STEVEN K. GREEN
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
518 C Street, N.E.
Washington, D.C. 20002
(202) 466-3234